No. 86210-9

IN THE SUPREME COURT
OF THE STATE OF WASHINGTON

WASHINGTON STATE MAJOR LEAGUE BASEBALL STADIUM PUBLIC FACILITIES DISTRICT and THE BASEBALL CLUB OF SEATTLE L.P.,

Appellants,

v.

HUBER, HUNT & NICHOLS-KIEWIT CONSTRUCTION, a Washington joint venture; HUNT CONSTRUCTION GROUP, INC., a foreign corporation; and KIEWIT CONSTRUCTION COMPANY, a foreign corporation,

Respondents/Cross-Appellants,

v.

LONG PAINTING, INC., a Washington corporation; HERRICK STEEL, INC., a California corporation,

Cross-Respondents.

RESPONSE OF THE PFD AND THE MARINERS TO AMICUS CURIAE BRIEF BY ASSOCIATED GENERAL CONTRACTORS OF WASHINGTON

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I. INTRODUCTION

The Associated General Contractors' ("AGC") brief adds nothing new, merely echoing HK's arguments on the statute of repose and contractual "flow down" provisions. At bottom, the AGC asks the Court to accept on faith its plea that, unless this Court affirms, contractors will face "uncertainty" and "indefinite risk," which will "increase the costs of public works construction." AGC Br. 14. In fact, the AGC's warnings find no support in the record, the law, or common sense.

The Court should refuse to allow the AGC's rhetoric to sway it. This case involves a straightforward claim to recover $3 million the Mariners and PFD paid to correct HK's defective work. They discovered the defect less than six years after substantial completion (and within five years of HK's termination of services), promptly notified HK of the problem, gave HK an opportunity to review the defect, and then spent $3 million for repairs. Despite the AGC's protests, no adverse consequences will ensue if the Court allows the Mariners and the PFD to seek reimbursement from HK for correcting a clear construction error:

First, the AGC ignores fact-specific grounds for reversal that implicate none of the AGC's policy concerns. Specifically, principles of judicial estoppel, waiver, and law of the case counsel reversal based on HK's representations to this Court (on which the Court relied) that this

claim accrued on July 1, 1999. Further, even if the accrual provision does not apply, the record shows that, as a factual matter, the Mariners' and the PFD's claims accrued ***before*** the AGC says the statute of repose ran.

Second, the AGC ***admits*** Section 13.7 in the General Conditions specifies a date certain for the accrual of claims within the statute of repose. Nevertheless, the AGC urges the Court to ignore that language based on what it declares to be its "purpose." AGC Br. 6. Even if an unexpressed "purpose" theoretically ***could*** trump a contract's express language—a position at odds with decades of case law—the AGC in this instance has plucked the so-called "purpose" out of thin air. The contract makes clear the accrual clause applies "in any and all events."

Third, the AGC's "public policy" argument asks the Court to hold that public entities such as the PFD in 1996 had no right to negotiate with contractors to set a specific accrual date for claims—at least if doing so would have a negative impact on contractors. AGC Br. 8-9. But the AGC cites no legal principle justifying such an extraordinary ruling, nor does it point to any data that might lend credibility to its stated concerns.[1]

[1] The Mariners and the PFD agree with the AGC that "the party who is best able to control the risk (*i.e.*, the subcontractor who performs the work) should likewise be the one to bear the risk." AGC Br. 10-11.

II. ARGUMENT

A. The AGC Ignores Independent Grounds for Reversal.

The AGC urges this Court to "hold the construction statute of repose bars the PFD's claims against Hunt-Kiewit." AGC Br. 2. Despite that broad request, the AGC ignores two important grounds for reversal.

The AGC first overlooks the undisputed fact that HK repeatedly told the trial court and this Court that the contractual accrual provision was enforceable and satisfied the statute of repose. *See* CP 175; Br. of Resp./Cross-Appellants, No. 81029-0 (Aug. 24, 2007) at 12, n.8. This Court relied on that representation, noting that "no party asserts that [the statute of repose] is applicable." *Wash. State Major League Baseball Stadium Pub. Facilities Dist. v. Huber, Hunt & Nichols-Kiewit Constr. Co.*, 165 Wn.2d 679, 686 n. 1, 202 P.3d 924 (2009). The Court therefore need not consider the substance of the AGC's argument as to the statute of repose. Instead, it can (and should) hold HK to its prior representations in this case. *See* PFD/Mariners Br. 17-23; PFD/Mariners Reply 2-6.

But even if the Court allows HK to do an about-face and rely on the statute of repose, it can (and should) reverse based on the ***facts*** in this record, without reaching the AGC's broader policy arguments. If one measures accrual by a discovery rule, as HK advocates, the Mariners' and PFD's claims accrued months before the period of repose expired under

the AGC's theory: Mariners President Chuck Armstrong discovered the manifestation of HK's breach, i.e., large paint blisters, in February 2005; by May 2005—two months ***before*** the AGC says the statute of repose ran—the Club knew fixing the blisters would be a "pretty big job" sufficient to get attention in the capital budget. *See* PFD/Mariners Br. 33-42; PFD/Mariners Reply 17-22. Despite this, HK argues accrual did not occur until September 2005, when the Mariners' expert pinpointed the cause of the paint blisters: HK's failure to apply the required primer. But ***no*** court has adopted a discovery rule that requires a plaintiff to hire an expert and learn every nuance of a claim before the statute of limitations begins to run. Instead, "[a] person who has notice of facts that are sufficient to put him or her upon inquiry notice is deemed to have notice of all facts that a reasonable inquiry would disclose," and the claim accrues at that point. *1000 Virginia Ltd. P'ship v. Vertecs Corp.*, 158 Wn.2d 566, 581, 146 P.3d 423 (2006). Here, the claims accrued by February 2005—five years and seven months after substantial completion, and fewer than five years after HK stopped work on the project.[2]

[2] HK performed substantial construction work on Safeco Field well into 2000. Under RCW 4.16.310, the statute of repose began running on ***the later of*** substantial completion or "the termination of the services enumerated in RCW 4.16.300." Nothing in the statute conditions the extension of the repose period on a nexus between HK's post-completion services and the cause of action. To the extent one might read *Parkridge Associates Ltd. v. Ledcor Industries, Inc.*, 113 Wn. App. 592, 599, 54 P.3d 225 (2002), as requiring such a nexus, the Court should overrule it. *See* PFD/Mariners Reply 20-22.

These independently-sufficient grounds for reversal implicate no enduring policy issues of concern to the AGC.

B. Enforcing the Agreed Accrual Date Does Not Undermine the Statute of Repose.

The AGC devotes much of its brief to arguing something no one disputes, i.e., that the statute of repose "applies to actions brought for the benefit of the state," such as this one. AGC Br. 3. The statute of repose, of course, bars any cause of action that "has not accrued within six years after ... substantial completion of construction, or within six years after ... termination of services, whichever is later." RCW 4.16.310. But it does ***not*** define when a cause of action accrues or establish when the law deems a contractor to terminate services—issues resolved by looking to the facts of each case. Because this case revolves around the accrual date and the date when HK stopped working on the ballpark, the AGC's four-page discussion of the 1986 amendment to the statute of repose (AGC Br. 3-6) has only academic interest.[3]

[3] Even so, the AGC twists the background to this amendment. According to the AGC, the Legislature made the statute of repose applicable to public projects "in part to avoid the possibility of 'unlimited risk' to participants in construction projects." AGC Br. 5. Not so. In the preamble on which the AGC relies, the Legislature noted only that then-current tort law doctrines—***not*** related to the statute of repose—left "professionals, such as architects and engineers" facing "difficult choices, financial instability, and unlimited risk in providing services to the public." 1986 Wash. Laws, ch. 305 § 100. Here, the Mariners and the PFD ask the courts to hold HK responsible for an obvious construction error that cost $3 million to correct (to be paid from public funds), on a project for which the HK joint venture received hundreds of millions of dollars. Concepts of "financial instability" and "unlimited risk" have no bearing here, as the AGC well knows.

When the AGC finally argues the issues in this case, it relies on its unsupported *ipse dixit* rather than the record or the law. The AGC first urges the Court to "disregard" the agreed accrual date in Article 13.7 of the General Conditions on the theory that "it has no purpose," given that this Court has found the claim "exempt from the statute of limitation." AGC Br. 6. But the Mariners and the PFD already refuted this precise argument: a textual analysis of Article 13.7 shows the accrual date applies "in any and all events," ***not*** only for purposes of the statute of limitations. PFD/Mariners Reply 6-9. The AGC does not even try to explain how the words of Article 13.7 could support a different reading.

As a fallback, the AGC claims the PFD lacked power to agree to a date certain for the accrual of claims, at least if the agreement "would deny the public works contractor the protections of the statute of repose and subject it to potentially unlimited liability." AGC Br. 6-7. *See also* HK Br. 24-25. In support of this *ultra vires* argument, the AGC cites ***only*** the court of appeals decision in *South Tacoma Way, LLC v. State*, 146 Wn. App. 639, 191 P.3d 938 (2008). But this Court ***reversed*** in *South Tacoma Way*, holding the State's violation of an express statutory ***requirement*** (of notice to an adjoining property owner) did not render its contract for sale of surplus property *ultra vires*. *South Tacoma Way, LLC v. State*, 169 Wn.2d 118, 233 P.3d 871 (2010). Here, the AGC points to no statutory

requirement (or prohibition) violated by Article 13.7. *See* PFD/Mariners Reply 13. Nor does the AGC identify any statute forbidding parties from agreeing to claim accrual dates in their contracts—even though the Legislature ***has*** elected to prohibit other types of clauses in construction agreements. *See, e.g.*, RCW 4.24.115 (declaring certain indemnity clauses in construction agreements "void and unenforceable"); RCW 4.24.360 (declaring "void and unenforceable" certain no-pay-for-delay clauses in construction agreement); *see also* PFD/Mariners Br. 31-32.

Finally, hoping to persuade the Court that the PFD forced the agreed accrual date on a helpless contractor, the AGC asserts HK's contract "was not negotiated; it was drafted by the PFD and offered on a take-it-or-leave-it basis." AGC Br. 6. But the AGC cites ***nothing*** to support the false impression that the PFD strong-armed HK, a joint venture comprised of two of the world's largest construction companies. In fact, as the Mariners and the PFD explained (and the AGC does not refute), the PFD selected HK based on qualifications, and HK negotiated ***both*** contract terms ***and*** contract price. *See* PFD/Mariners Reply 13 n.5.[4]

[4] The PFD constructed Safeco Field under the procurement process outlined in RCW 39.10.340 *et seq*. Under this process, the owner selects the contractor using evaluation factors such as quality of personnel and previous experience. RCW 39.10.360. The owner makes the selection early in the design process, i.e., when design is 10% complete or less, *id.*, and the parties negotiate a contract price only later, when the design is at least 90% complete. RCW 39.10.370. If negotiations fail to result in a mutually agreed contract sum, the owner may then negotiate the contract with another qualified proposer. Based on this statute, the contract here said "good faith negotiations" over the contract

Later, HK negotiated substantial modifications to the original contract. *Id.* ***Nothing*** in the record suggests HK lacked the opportunity (or leverage) to bargain over the agreed accrual date, had it chosen to do so.

Thus, if the Court reaches the issue, it should hold Article 13.7 implements the statue of repose by defining when causes of action accrue, thereby eliminating prospective legal uncertainty. No legal principle, and certainly nothing in the statute of repose itself, negates the freedom of the PFD and HK to contract for a defined accrual date—even if the agreed date has an adverse effect on one party in particular circumstances.

C. The AGC's So-Called Policy Considerations Do Not Justify Refusing to Enforce the Agreed Accrual Date.

The AGC cites various "policy considerations" that it says require "strict enforcement" of the statute of repose. AGC Br. 7. Among other things, the AGC says defendants "***can*** be severely prejudiced by … delay," *id.* (emphasis added), pointing to the possibility of lost evidence or lost insurance policies, a "negative incentive" to maintain facilities, higher insurance costs, and "unlimited" liability. *Id.* 7-10.

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sum would occur in late 1996 and early 1997 after contract execution. CP 44. HK could have used those negotiations to modify contract provisions it deemed unduly risky—or could have negotiated for additional compensation to account for perceived risk. And even after negotiation of the initial contract, HK revisited contract terms. For example, in late 1997, after budget overrun issues began to arise, the parties negotiated and executed a complex set of contract amendments known as "the First Modification." CP 1004-50. In 1998, as claims mounted, the parties negotiated an agreement to modify the detailed claim and dispute resolution procedures. CP 985-1000. As a factual matter, then, the AGC simply gets it wrong when it implies HK did not negotiate contract terms.

This case involves none of the AGC's hypothetical risks. In the first place, when the PFD and HK signed their Contract in 1996, ***any*** contractor (even on a private project) faced exposure for up to ***twelve years*** after finishing work, i.e., the six year accrual period plus the six year limitations period. *See* PFD/Mariners Reply 14-15 (citing *Gevaart v. Metco Constr. Inc.,* 111 Wn.2d 499, 502, 760 P.2d 348 (1988) (if action accrues within six years, period for suit is "extended by the relevant limitation statute as to that injury")). The Mariners and PFD sued ***years*** before the expected outside date for the assertion of claims—even had they been subject to ***both*** the statute of repose ***and*** a statute of limitations. They did not "sleep on their rights," as the AGC suggests. *See* AGC Br. 8.

Further, neither the AGC nor HK points to any ***actual*** prejudice from the supposed delay. Despite the AGC's parade of horribles (AGC Br. 7-8), no one claims HK has lost or exhausted its insurance; that HK lacks records (to the contrary, HK has produced extensive project documents); that the Mariners and the PFD failed to maintain Safeco Field (to the contrary, diligent maintenance revealed HK's defective work); or that HK faces "unlimited" liability (to the contrary, the Mariners and the PFD ask only that HK bear the $3 million cost of repairing specific defective work). In a real sense, this is run-of-the-mill litigation—except

for the delay associated with two trips to this Court prompted by HK's vigorous effort to avoid defending its defective work on the merits.

Rather than address the actual facts of this case, the AGC opts for a scare tactic, suggesting a ruling in favor of the Mariners and the PFD will make contractors "uninsurable," AGC Br. 8, with the result that future "costs of public construction will inevitably rise." *Id.* 9. But the AGC cites no data to support this doomsday scenario, and common sense disproves it. Because project-specific insurance protects the project owner as well as the contractor, public owners have no interest in imposing contract clauses that make contractors on their projects "uninsurable." For that reason, any rational project owner would agree only to contracts that make insurance available—even if that means negotiating a claim accrual clause different from the version of Article 13.7 at issue here.[5]

Further, the AGC focuses on the cost of insurance as much as its availability. AGC Br. 9. But if the AGC has it right (which the Mariners and the PFD doubt), public owners will feel the most immediate monetary impact of Article 13.7's accrual clause: as the AGC knows, project

[5] As the AGC knows (but failed to tell the Court) the AIA years ago changed Article 13.7 so it no longer resembles the claim accrual clause at issue here. Article 13.7 of the 2007 revision to the AIA General Conditions provides: "The Owner and Contractor shall commence all claims and causes of action, whether in contract, tort, breach of warranty or otherwise, against the other arising out of or related to the Contract ... within the time period specified by applicable law, but in any case not more than 10 years after the date of Substantial Completion of the Work." Thus, contrary to what the AGC implies in arguing about "liability insurance for public works construction," AGC Br. 9, the Court's reading of a superseded version of Article 13.7 will have ***no*** impact on future projects.

owners pay insurance and bond premiums as part of the contract sum, as the PFD did here. *See* CP 46, 48. Because rational owners want projects both insured and built affordably, the market would prompt rational public owners to negotiate contracts (including, if necessary, the accrual clause) that make insurance both available and affordable. The AGC points to nothing—except its rhetoric—to suggest future public owners will elect to shoot themselves in the foot by insisting on contract clauses that would increase their costs.

III. CONCLUSION

For these reasons, as well as the reasons stated in prior briefing, the Court should reverse the trial court's most recent summary judgment, reinstate the PFD's and Mariners' claims, and remand the case with the direction that the parties litigate the claim on its merits.

RESPECTFULLY SUBMITTED this 6th day of January, 2012.

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PROOF OF SERVICE

I hereby certify that on the 6th day of January, 2012, I caused a true and correct copy of the foregoing document titled "Response of the PFD and the Mariners to Amicus Curiae Brief of the Associated General Contractors of Washington" to be mailed to counsel of record at the following addresses by depositing the envelope in regularly maintained interoffice mail. This mail is collected and deposited with the United States Postal Service on the same day it is deposited in interoffice mail, postage thereon being fully prepaid:

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I also served each of these counsel by email, at the same email addresses used by the Court in delivering notices related to this case.

EXECUTED at Seattle, Washington this 6th day of January, 2012.

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Subject: 86210-9 - Wash State Major League Baseball Stadium et al v. Huber, Hunt & Nichols-Kiewit Construction Co et al

RE: 86210-9 - ***Washington State Major League Baseball Stadium PFD, et al. v. Huber, Hunt & Nichols-Kiewit Construction Co, et al.***

Ms. Bausch: I am attaching the following document for filing with the Court:

RESPONSE OF THE PFD AND THE MARINERS TO AMICUS CURIAE BRIEF BY ASSOCIATED GENERAL CONTRACTORS OF WASHINGTON

All counsel have been cc'd on this email, to expedite delivery. Counsel are also being served by mail pursuant to RAP 18.6(b).

I would be grateful if you could confirm the Court's receipt of the filing. Regards, Steve Rummage (WSBA No. 11168)

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